Supreme Court, U.S.
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No. 85-1432.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

WILLIAM J. MARTIN,
PETITIONER,

v.

DIGHT W. CRAIN, PETER H. GARLAND, J. VINCENT SAUNDERS, MARSHALL LEBOWITZ, MARK H. RAIDER, PAUL AMBLER, AND PAMELA J. KAUFMAN, AS THEY ARE MEMBERS OF THE NATICK SCHOOL COMMITTEE AND JOSEPH A. KEEFE, SUPERINTENDENT OF SCHOOLS OF THE TOWN OF NATICK,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Petitioner's Reply Brief.

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Reasons for Submitting Supplemental Brief.

This brief is written pursuant to Rule 25(5) as a supplement to petitioner's petition for certiorari which was filed with this

Court on March 7, 1985. This brief is supplied as a result of a decision issued by this Court on March 19, 1985, *Cleveland Board of Education* v. *Loudermill,* 53 U.S.L.W. 4306 (U.S. Mar. 19, 1985). *Loudermill* was decided twelve (12) days after petitioner's petition for certiorari was filed with this Court on March 7, 1985 and eight (8) days after the deadline established by statute, March 10, 1985, for filing the same. The decision in *Loudermill* also renders advisable a response pursuant to Rule 24(4) to issues raised by the respondents, Natick School Committee, and, in particular, to the respondent-intervenor, Francis X. Bellotti, the Attorney General of the Commonwealth of Massachusetts.

BECAUSE PETITIONER MARTIN AS A TENURED TEACHER WITHIN THE MEANING OF M.G.L. c. 71, § 42 HAS A PROPERTY INTEREST IN CONTINUING EMPLOYMENT, HE HAS A PROPERTY INTEREST IN THE FIVE DAYS THAT HE WAS SUSPENDED ACCORDING TO *Loudermill*.

A. *Because Chapter 71, § 42 Provides that Martin Cannot be Dismissed Except Upon "Cause" He Has a Property Interest in His Continued Employment.*[1]

The Attorney General of the Commonwealth concedes the constitutional axiom that a citizen possesses an expectancy, or a property interest, if the deprivation of such inteest is conditioned upon a showing of "cause." Attorney General's Brief in Opposition, pp. 8-11, and cases cited therein.

Moreover, the Supreme Judicial Court, the highest court of the Commonwealth, has recognized that a tenured teacher has a property interest in continued employment by virtue of

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[1] Pet. 6.

M.G.L. c. 71, § 42. In the instant case, the Supreme Judicial Court stated: "[i]t is without dispute that Martin was a tenured teacher . . . . entitled to the protection that State law affords to those who have attained that status." *Martin* v. *School Committee of Natick,* 393 Mass. 430, 434 (1984).

B. Loudermill *Supports the Proposition that If a Tenured Teacher Has a Property Interest in Continued Employment, He Also Has a Property Interest in the Days Lost in a Short Suspension.*

In *Cleveland Board of Education* v. *Loudermill, supra,* this Court held that two tenured Ohio civil servants were entitled to certain pre-termination procedures notwithstanding the fact that the Ohio Civil Service Statute did not provide such pre-deprivation procedures. *Loudermill* expressly rejected the position of the plurality in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974) that a public employee's expectancy in continued employment is limited by the statutory procedures which protect it. *Loudermill, supra* at 4307.[2]

The Court concluded that in most situations, due process procedures shall include at the very least "a pretermination opportunity to respond coupled with post-termination administrative procedures." 53 U.S.L.W. at 4310. Moreover, continues the Court, in situations like the case *sub judice,* where the suspension, not the termination, of a tenured employee is at issue, constitutional protections still cannot be abandoned. This is so, said the Court, even where the supsension is necessitated by an emergency obviating the possibility of pre-termination procedures:

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[2] Certainly *Loudermill* eliminates the possibility of arguing that solely because M.G.L. c. 71, § 42D does not identify procedures relative to a five-day suspension that no procedures are constitutionally mandated.

> Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending *with pay* . . . . (Emphasis added.)

53 U.S.L.W. at 4309.

Obviously, the Court's mandate that even the necessary preemptory suspension of a tenured employee be accomplished "with pay" indicates that a tenured employee has a property interest in each and every day that he or she is employed. To put it another way, "[O]nce a property interest is created, it cannot be removed completely or in chunks." (Pet 8.)

It is critical to note that in its approach to preemptory suspension this Court does not adopt the proposition advanced by the Attorney General[3] that a property interest does not attach in the suspension of a tenured employee unless state law requires an additional showing of "cause" in connection with such suspension.

C. Loudermill *Supports the Proposition that the Property Involved in the Five-Day Suspension is Not De Minimus.*

The requirement in *Loudermill* that an employee be compensated during a summary suspension undercuts the Attorney General's argument that a five-day suspension implicates only a *de minimus*[4] loss of property. The Supreme Court did not limit its mandate that preemptory suspensions be accomplished "with pay" to only those suspensions exceeding a specific number of days. On the contrary, in *Loudermill* the Court has established that the suspension of a public employee for even

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[3] Attorney General's Brief in Opposition.

[4] Pet. 9.

one day or less implicates a protectable property interest. In addition, the Supreme Court has recognized in *Parratt* v. *Taylor*, 451 U.S. 527, 536-537 (1981), that a hobby kit valued a mere $23.50 constitutes property adequate to warrant Fourteenth Amendment safeguard. The parties stipulated before the state trial court that the lost pay amounted to $523.75.[5]

Finally, *Loudermill* attaches much more significance to the deprivation of the livelihood of a United States citizen than does the Attorney General of the Commonwealth. The Attorney General claims that the temporary suspension of a student from his education is a more serious event than the temporary suspension of a teacher because the latter results only in a "brief interruption of income." Brief in Opposition, p. 17. On the other hand, the *Loudermill* Court concludes:

> [t]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.

53 U.S.L.W. at 4308.

Certainly, if the ten-day suspension of a child from school is recognized "is a serious event in the life of a suspended child,"[6] then it can be appreciated that the multiple day suspension of the individual who provides this education to a whole classroom of children constitutes a very fundamental right indeed.

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[5] While not reproduced in the record-appendix before the Supreme Judicial Court the parties stipulated before the trial court on the amount of pay lost to Martin on account of his five-day suspension. (A. 1.)

[6] Attorney General's Brief in Opposition, p. 17, citing *Goss* v. *Lopez* at 576.

Conclusion.

For the reasons stated herein, the Court should grant certiorari and reverse the judgment of the Supreme Judicial Court.

Respectfully submitted,

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Appendix.

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 80-1075

WILLIAM J. MARTIN,
Plaintiff,

v. STIPULATION RE: DAMAGES

DIGHT W. CRAIN, et al.,
Defendants.

The parties hereby stipulate and agree that if defendants are liable for any damages in connection with the 5-day suspension of plaintiff William J. Martin from January 21 to January 25, 1980, any such liability would be in the total amount of $523.75. Accordingly, the parties request the Court to enter final judgment as requested in the Joint Motion for Entry of Final Judgment, submitted herewith.

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